EJIL:Talk!

Blog of the European Journal of International Law

June 17, 2015

European Court Decides that Israel Is Not Occupying Gaza

Written by Marko Milanovic

Yesterday the Grand Chamber of the European Court of Human Rights delivered judgments in two blockbuster cases regarding the aftermath of the Nagorno-Karabakh conflict between Armenia and Azerbaijan: *Chiragov and Others v. Armenia* and *Sargsyan v. Azerbaijan*. These are very rich judgments raising many important issues, and I will be writing up more detailed comments shortly. But I first had to share one particular little nugget: the Court has (implicitly!) decided that Israel is not the occupying power in Gaza. How so, you ask?

Both cases dealt with applications by persons displaced by the conflict who are not able to access their property in the affected areas. The *Sargsyan* case in particular dealt with the the denial of the applicant's right to return to the village of Gulistan. The village is located on the territory of Azerbaijan, but very close or on the so-called line of contact between Azerbaijan and the forces of the separatist Nagorno-Karabakh republic. Thus, in the view of the Azerbaijani government, the village was not under the control of Azerbaijan, and was moreover mined and inaccessible to any civilian.

In fact, when it ratified the European Convention Azerbaijan made the following declaration (para. 93 of the judgment):

> The Republic of Azerbaijan declares that it is unable to guarantee the application of the provisions of the Convention in the territories occupied by the Republic of Armenia until these territories are liberated from that occupation.

> Article 42 of the Regulations concerning the Laws and Customs of War on Land, The Hague, 18 October 1907 (hereafter "the 1907 Hague Regulations") defines belligerent occupation as follows:
>
> "Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised."
>
> Accordingly, occupation within the meaning of the 1907 Hague Regulations exists when a state exercises actual authority over the territory, or part of the territory, of an enemy state(1) . The requirement of actual authority is widely considered to be synonymous to that of effective control.
>
> Military occupation is considered to exist in a territory, or part of a territory, if the following elements can be demonstrated: the presence of foreign troops, which are in a position to exercise effective control without the consent of the sovereign. According to widespread expert opinion physical presence of foreign troops is a sine qua non requirement of occupation(2) , i.e. occupation is not conceivable without "boots on the ground" therefore forces exercising naval or air control through a naval or air blockade do not suffice(3) .

There are three footnotes here, all to important works on the topic, including the proceedings of an expert meeting organized by the ICRC – let me quote these in full:

> [1]. See, for example, E. Benvenisti, The International Law of Occupation (Oxford: Oxford University Press, 2012) at p. 43; Y. Arai-Takahashi, The law of occupation: continuity and change of international humanitarian law, and its interaction

> Roberts, 'Transformative Military Occupation; Applying the Laws of War and Human Rights', 100 American Journal of International Law 580 (2006) 585-586.
>
> [2]. Most experts consulted by the ICRC in the context of the project on occupation and other forms of administration of foreign territory agreed that 'boots on the ground' are needed for the establishment of occupation – see T. Ferraro, Occupation and other Forms of Administration of Foreign Territory (Geneva, ICRC, 2012), at 10, 17 and 33; see also E. Benvenisti, cited avove, at p. 43ff; V. Koutroulis, Le debut et la fin de l'application du droit de l'occupation (Paris: Editions Pedone, 2010) at pp. 35-41.
>
> [3]. T. Ferraro, cited above, at pp. 17 and 137; Y. Dinstein, cited above, at p. 44, § 100.

In para. 95 the Court then proceeds to cite the ICRC Customary IHL Study as well as Article 49 GC IV regarding rights of displaced persons. (The same text can be found in paras. 96-97 of the *Chiragov* judgment). But the really important bit happens in paras. 143-144 of *Sargsyan*:

> 143. At this point the Court considers it useful to reiterate that Azerbaijan has deposited a declaration with its instrument of ratification expressing that it was "unable to guarantee the application of the provisions of the Convention in the territories occupied by the Republic of Armenia" (see paragraph 93 above). In its decision on the admissibility of the present case, the Court has held that the declaration was not capable of restricting the territorial application of the Convention to certain parts of the internationally recognised territory of Azerbaijan (Sargsyan (dec.), cited above, §§ 63-65) nor did it fulfil the requirements of a valid reservation (ibid., §§ 66-70).

> widely considered as translating to effective control and requiring such elements as presence of foreign troops, which are in a position to exercise effective control without the consent of the sovereign (see paragraph 94 above). On the basis of all the material before it and having regard to the above establishment of facts, the Court finds that Gulistan is not occupied by or under the effective control of foreign forces as this would require a presence of foreign troops in Gulistan.

See what I meant? Replace "Gulistan" with "Gaza", and there you have it! In fact, I'm pretty sure that this is at least one judgment of the European Court that Israeli governmental legal advisors will be citing all the time, whenever the issue of Gaza's occupation is brought up (and good for them).

Just to be clear, I don't think that the Court is wrong here – I'm in fact on the record in saying that Gaza most probably does not fit any classical notion of occupation, and that in fact occupation, as the Court says, requires troops on the ground. But was the Court *wise* in reaching this question, and deciding it as categorically as it did? That, I think, is more questionable; it seems likely that the issue of Azerbaijani control over the village could have been dealt with in some other way. The work that the whole occupation point does in the analysis that follows (paras. 145-150), which concludes that the Convention applies in full to the village, seems marginal at best.

I also very much doubt that the judges were really aware of the implications a categorical statement such as the one made here will have on the whole Gaza debate. If they were, I imagine that they would have avoided it like the plague. Note, in that regard, the lack of IHL experts on the Strasbourg bench – which, to be clear, is most definitely not the Court's own fault! This inevitably leads to losing some nuance in appreciating current debates in IHL, with the Court perhaps overstating the degree of consensus among experts on these

cites, where he says that 'the Occupying Power must deploy 'boots' on the ground in *or near* the territory that is under occupation' (emphasis mine), and in fact thinks that Gaza remains occupied.

So there – Gulistan and Gaza have discovered that they have something in common, and the European Court of Human Rights is starting to make clear, decisive, and oh-so-very citeable pronouncements on key concepts of IHL.

CATEGORIES

Armed Conflict **EJIL Analysis**

European Convention on Human Rights

European Court of Human Rights **Extraterritorial Application**

Featured **International Humanitarian Law** **Israel**

Occupation **Palestine**

TAGS

No tags available

Marko Milanovic

Marko Milanovic is Professor of Public International Law at the University of Reading School of Law. He is co-editor of EJIL: Talk! and a member of the EJIL's

LEAVE A COMMENT

Comments for this post are closed

COMMENTS

HIDE COMMENTS

38 comments

Mark Nelson says

June 17, 2015

It's ironic that the Court cites - among others - Tristan Ferraro, a legal adviser at the ICRC, to support its main claim; as Peter Maurer, the President of the ICRC, has explicitly taken the position that Gaza IS occupied territory

(see: Peter Maurer, Challenges to Humanitarian Action in Contemporary Conflicts: Israel, the Middle East and Beyond, 47 Isr. L. Rev. 175, 179 (2014)).

Not only that, but the Court excluded a KEY caveat in Ferraro's argument.

According to Ferraro:

"However, in some specific and exceptional cases – in particular when foreign forces withdraw from occupied territory (or parts thereof) while retaining key elements of authority or other important governmental functions therein which are typical of those usually taken on by an Occupying Power – it is proposed